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IN THE

Supreme Court of the United States

October Term, 1970

No. 944

ARMCO STEEL CORPORATION,
Petitioner,
and
HONORABLE EDWARD DUMBAULD, Judge, United States District Court for the Western District of Pennsylvania,
Nominal Petitioner,
v.
NANCY SCHUTTE, Administratrix; ACE DORAN HAULING & RIGGING COMPANY,
and
TIPPINS MACHINERY COMPANY,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE THIRD CIRCUIT

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Counter-Statement of Questions for Review

1. Whether it is proper and within the power of the Court of Appeals to issue a writ of Mandamus to a District

Court Judge where he has exceeded his legal powers and abused his discretion in issuing an order transferring a case to a forum other than the one of plaintiff's choice.

2. Whether plaintiff was required to undertake the futile act of petitioning by it the District Court to certify that an immediate appeal should be allowed by it from an interlocutory order (under 12 USC 1292 (b)) before she could seek relief through a writ of Mandamus.

Statement of the Case

The Schutte family, including the deceased husband-father, Richard, resided in the Pittsburgh, Pennsylvania area. Deceased was employed by the third-party defendant, Tippins Machinery Company, a Pennsylvania corporation engaged in business in suburban Pittsburgh.

On the date of his fatal accident, Mr. Schutte was sent by his employer to the Kansas City, Missouri plant of defendant, Armco Steel Company, to observe and check a trailer truck load of used machinery which Tippins was purchasing from Armco. The trailer was being loaded in the Armco plant by three of its employees, who were using an overhead electric crane. Schutte was standing on the floor of the plant next to the bed of the trailer and was checking off the material as it was loaded. Several hours before the accident occurred Armco employees had loaded a 4,000 pound "run-out-table" onto the trialer. Depositions taken by plaintiff of the three employees demonstrated that the heavy parts hanging from the moving crane had struck and overturned the run-out-table upon Schutte. He was killed instantly.

A number of photographs of the scene were taken by Armco shortly after the occurrence and these were put in evidence at the depositions.

The only witness other than the Armco employees was the truck driver, Walter Baldwin, who resided in New Mexico when last heard from. He was an employee of Belger Cartage Service, Inc., of Kansas City, a hauling concern.

Several days after the accident, Baldwin operated the tractor-trailer and the load of machinery to the Tippins Company, in Pittsburgh. The truck was operated from Illinois to Pittsburgh under the ICC permit of the defendant, Ace Doran Hauling & Rigging Company, an Ohio corporation, which actively engages in business in Western Pennsylvania but has neither an office nor engages in business in Missouri.

Mrs. Schutte, as administratrix of her husband's estate, filed this action in the Western District of Pennsylvania on July 22, 1969, against both Armco and Ace Doran, claiming damages under the Pennsylvania Survival Act and the Wrongful Death Statute. Armco is incorporated in Ohio and it operates large manufacturing plants in Western Pennsylvania.

No steps were taken to transfer this action from Pennsylvania to Missouri for approximately six months after the suit was filed. During this time, Armco conducted extensive legal activity in the case, including the filing of pleadings, the presenting and answering of interrogatories, the bringing of Tippins into the case as a third-party defendant and the filing of a petition to bring in Belger Cartage as a third-party defendant on the ground that it conducted its business in Western Pennsylvania. (This motion has not been passed upon.) Armco avers that Tippins, which neither has a place of business nor conducts its operations in Missouri, undertook by written agreement to indemnify Armco for damages resulting to it in a case such as the present one. Tippins denies this.

District Court Judge Edward Dumbauld did not pass upon plaintiff's objection to the transfer motion on the ground that the suit could not be transferred because it could not have been brought originally in Missouri (28 USC 1404 (a)). Neither Tippins nor Ace Doran were subject to jurisdiction or venue in Missouri. Upon petition and after consideration of written briefs and oral arguments, the Court of Appeals for the Third Circuit, consisting of Judges McLaughlin, Staley and Adams, issued a writ of Mandamus to Judge Dumbauld directing that he rescind his order of transfer. The order was rescinded.

Summary of Argument

The District Court Judge exceeded his legal power and also abused his discretion in issuing an order transferring this case to Missouri, a state in which the action could not have been brought. Two of the parties in the litigation could not have been sued by plaintiff in Missouri. Furthermore, an overwhelming hardship would result to plaintiff if this case were transferred, and only minimum inconvenience would be caused to defendant Armco if the case is tried in the forum of original suit. A transfer would not be for the convenience of the parties or witnesses or in the interest of justice.

It was not required by law and would have been a futile gesture for plaintiff to seek leave of the District Court Judge to allow an interlocutory appeal on the ground that a controlling question of law was involved.

There is no substantial difference between the decisions of the several Circuit Courts on the application of the All Writs section of the Code (28 USC 1651 (a)). Where a District Court has exceeded its power or clearly abused it's discretion in ordering the transfer of a case.

ARGUMENT

I.

Where the Lower Court exceeded its power and abused its discretion in transferring the above case to another forum, did the Court of Appeals properly issue a Writ of Mandamus?

Your Honorable Court has reviewed many cases wherein Courts of Appeal have passed upon Petitions for Mandamus where the District Court had granted or refused petitions to transfer cases to another forum under USC Section 1404 (a). Respondent refers to the following authorities:

Van Dusen v. Barrack, 376 U. S. 612; 86 Supreme Court 805;

Hoffman v. Blaski, 363 U. S. 335; 80 Supreme Court 1084;

Moore's Federal Practice, Second Ed., Vol. 1, Sec. 0.147 (p. 1968);

Change of Venue, Mode of Review, 2 ALR, Fed. 573, 599.

This Court has approved the use of the Mandamus writ as a proper exercise of authority under Section 1651 (a) of the Code where a District Court has exceeded its power in granting or refusing a transfer. A long list of cases in the Court of Appeals establishes this as a proper method of review under such circumstances.

The defendant-petitioner concedes that the writ of Mandamus is properly invoked where the inferior court has exceeded its authority by a usurpation of judicial power.

Judge Dumbauld's transfer order was in violation of a specific limitation of his authority. Section 1404(a) limits

the right to transfer a case to a district where the action "might have been brought." The present action could not have been brought against either the original defendant, Ace Doran, or the additional defendant, Tippins, in Missouri.

To justify its transfer motion Armco referred to the new Missouri long-arm statute (Sec. 506.500-520 Vernon's Annot. Mos. Statutes). The statute had not even been referred to in the lower court.

There is certainly a real question as to whether plaintiff had an 'unqualified right' to bring her suit in Missouri, as was stated by the Court of Appeals (Petitioner's Brief, p. 18).

Petitioner urges that Ace Doran brought itself within the reach of the long-arm statute because contractual arrangements for the interstate shipment were allegedly made in Missouri. Plaintiff disagrees with this statement. There was no such proof in the record. Petitioner presented this argument to the Court of Appeals in its brief (pp. 28, 29) and the thread upon which it sought to support the conclusion is an interrogatory answer made by Tippins. This company said that Schutte is the only person "who might have communicated with Belger or Ace Doran" and that "Tippins has no knowledge as to whether Schutte did or did not have any such communication." From this petitioner argued that Schutte did consummate a contract in Missouri.

This Court has recognized the right of a Circuit Court to issue a writ of Mandamus to the lower court when the latter has abused its discretion in issuing a transfer order. This Court said in *Bankers Life & Casualty Co. v. Holland*, 346 U. S. 379; 74 S. Ct. 145, that the writ is to be

used where there is a "clear abuse of discretion or 'usurpation of judicial power'" (p. 148).

In this case the Court of Appeals based its decision in substantial part on the ruling that the District Court as a matter of law could not transfer the present case to Missouri. The several cases cited by petitioner in support of its argument that the Court was making a *de novo* review are not in point. Most of these cases involve the question of whether a District Court had properly evaluated certain factors in making its decision as to the transfer of a case. Such was not involved here where the District Court had ignored the statutory restrictions and limitations on its power.

After reviewing the facts of the present case the Court of Appeals properly said that "it is inconceivable that 'the convenience of the parties and witnesses' strongly weighed in favor of the transfer of the action of plaintiff's rightfully chosen forum" (See explanation in Petitioner's Brief, p. 21). For this second reason, the Court properly issued a writ of Mandamus.

-a-

The Second Action Filed by Plaintiff

Petitioner has attempted to weave an argument to support its petition for certiorari out of the fact that plaintiff elected to file an action in the state court (a cautionary suit) against Armco alone, after Armco had filed its petition to transfer the first action to Missouri. Defendant immediately removed the second suit to the District Court and it was designated as Civil Action No. 70-206. There is no relation whatsoever between this petition for certiorari, which concerns only the action at Civil Action No. 69-874, and the second suit which plaintiff filed.

Upon the filing of the state court action, and Armco's removal of it to the District Court, plaintiff immediately filed a motion for leave to discontinue the suit. Armco then filed a motion to transfer the second action to Miscouri. District Court Judge Rosenberg refused both motions and no further action was taken with reference to either of them.

II.

No substantial conflict exists among Courts of Appeals relative to any alleged requirement that one resort to an appeal under 28 U. S. C. 1292 (b) as a pre condition to a Mandamus Petition.

It would have been useless and futile for plaintiff to ask Judge Dumbauld to declare a controlling question of law existed which required an immediate review under Section 1292 (b) of his transfer order. The lower court considered the issues involved in the transfer matter of so little concern that the Judge not only heard no testimony but refused plaintiff's request for leave to present an oral argument on the issues. After granting the transfer he refused plaintiff's motion for reconsideration of it.

No rule or statute requires that one first seek relief under Section 1292(b) before he can invoke the All Writs section, 1651 (a). The Second Circuit has specifically stated that no such circuitous procedure is required. *Golconda Mining Corp. v. Herlands*, 365 F. 2d 856 (C. A. 2, 1966) The cases cited by petitioner do not support its argument. *Rapp v. Van Dusen*, 350 F. 2d 806 (C. A. 3, 1965), involving an issue as to whether a judge who had been a nominal party in litigation should continue to preside in subsequent phases of it. He refused to disqualify himself. A Petition

for a Writ of Mandamus was presented and granted by the Appellate Court. The majority opinion writer suggested that in such cases a Petition for Mandamus should allege that an unsuccessful request for relief was made under Section 1292 (b) or "why such an application was inappropriate in the circumstances" (p. 813).

If the respondent-plaintiff had followed such a procedure and if no stay had been allowed in the meantime, the present action would have been transferred to Missouri before a Mandamus Writ was secured.

Next cited by petitioner is *Farrell v. Wyatt*, 408 F. 2d 662 (C. A. 2, 1969). The Court there held that relief under Section 1292 (b) is not the exclusive procedure for seeking review of a transfer order (p. 665).

Finally cited was *Panhandle Eastern Pipelines v. Thornton*, 267 F. 2d 459 (C. A. 6, 1959), where the Circuit Court refused Mandamus because the lower court had not abused its discretion or usurped its legal power.

Respondent refers the Court to *A. Olinick & Sons v. Dempster Bros., Inc.*, 365 F. 2d 439 (C. A. 2, 1966).

Conclusion

There has been no final judgment entered in this case. The Court of Appeals acted upon an interlocutory issue. Rule 20 of This Court is particularly applicable. The writ of certiorari will not be granted under these circumstances unless imperative public importance justifies the deviation from normal appellate procedure and requires immediate settlement in this Court. The present case is not in that category.

Respectfully submitted,

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